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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BENJAMIN PADILLA,

Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD,

Defendant and Respondent;

CALIFORNIA HIGHWAY PATROL,

Real Party in Interest and Respondent.

D054446

(Super. Ct. No. 37-2008-00079373-  
CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,

Timothy B. Taylor, Judge. Affirmed.

Benjamin Padilla appeals a trial court judgment denying his petition for a writ of mandate following the State Personnel Board's (SPB) sustaining of his dismissal as an officer with the California Highway Patrol (CHP). Padilla does not dispute that he engaged in sexual misconduct while on duty, but he contends the penalty of dismissal is unduly harsh and constitutes an abuse of the SPB's discretion. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Padilla became a CHP officer in March 2003. On August 11, 2005, Padilla and a female officer were working the graveyard shift in the same patrol car. While on duty, the officers held hands while they were transporting an arrestee, and Padilla "later failed to observe that arrestee when he was evaluated for drug use by a Drug Recognition Expert, and instead sent his partner a text message stating, 'I love you sweetie. I want ue [sic] body so bad right now.' "

After the arrest, Padilla drove his patrol car to a "Park and Ride" lot outside his area of responsibility, which other CHP officers routinely patrolled. He parked his car and "exposed his penis and allowed his partner to masturbate him until he ejaculated." Padilla submitted an official report "certifying that he worked on an arrest report from 4:30 a.m. to 5:00 a.m., when he actually spent 10 minutes of that time engaging in sexual relations with his partner."

In September 2005 the CHP learned of Padilla's conduct and placed him on administrative leave. After an investigation, the CHP dismissed Padilla effective August 29, 2006.

Padilla appealed the matter to the SPB. An administrative law judge conducted a hearing on December 27, 2006, and July 9, 2007. Padilla admitted his misconduct, but argued the penalty of dismissal was too harsh. He acknowledged he exercised poor

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<sup>1</sup> SPB joins in the CHP's briefing.

judgment, professed remorse, denied any likelihood of recurrence, and pointed out that this was his first disciplinary issue.

On August 27, 2007, the administrative law judge issued a proposed decision, which concludes Padilla's dismissal was warranted. The decision explains, "The public services clearly suffers harm when its peace officers use state time and resources to engage in personal sexual gratification rather than performing their duties upon the public highways." The decision notes, however, "Recurrence is unlikely, so long as [Padilla] does not work again with the same partner."

The decision states Padilla's conduct violated the following subdivisions of Government Code section 19572, which specifies conduct that constitutes cause for discipline of state employees: (c) inefficiency, (d) inexcusable neglect of duty, (p) misuse of state property, (r) violations of the prohibitions set forth in accordance with Government Code section 19990, and (t) other failure of good behavior.<sup>2</sup>

Further, the decision states Padilla's conduct violated several CHP policies and procedures, including: (1) the "CHP's policy on 'Incompatible Activities,' which provides, among other things, that it is an Incompatible Activity for a member of the CHP to use the time or equipment of the state for the private gain or advantage of the employee"; (2) "a San Diego Area Standard Operating Procedure which required [him] to remain in his assigned beat, unless directed otherwise by his supervisor"; (3) a procedure that "requires CHP employees to sign their reports [CHP 415 forms] 'acknowledging that

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<sup>2</sup> Government Code section 19990 enumerates conduct inimical to public employment.

it is a complete and accurate document' "; (4) a "procedure that requires CHP Officers to notify the communications center whenever they will be 'out of service' and defines 'out of service' to include 'anytime the patrol vehicle is stopped/parked any place other than the assigned beat and the operator is not actively engaged in road patrol related activities' "; (5) a "policy which establishes that an Officer is doing less than his full duty whenever an Officer's actions deviate from 'the steady, efficient, conscientious, and professional execution of the [CHP's] obligations' "; and (6) "General Order 0.8 [that] requires CHP Officers to abide by Professional Values," such as " 'Professionalism,' 'Respect,' and 'Integrity.' "

Additionally, the decision notes that "while [Padilla] was engaged in such conduct in a public parking lot, [he] risked arrest for the crime of lewd conduct" under Penal Code section 314.

The SPB adopted the administrative law judge's proposed decision and sustained Padilla's dismissal. The SPB denied his petition for a rehearing.

Padilla then filed original and amended petitions for an administrative writ of mandate in superior court. At the hearing, Padilla argued case law involving other public employees showed his dismissal was overly harsh. His attorney asserted that "CHP officers who have had sexual misconduct far in extreme of my client's case have not been dismissed." Padilla asked the court to order the SPB to reduce his punishment to a six-month suspension.

The court denied Padilla's petition, finding he showed no abuse of discretion concerning the degree of punishment imposed. The court explained, "Padilla exercised

incredibly poor judgment which violated the policies of the CHP." The court added, the "fact that other employees in alleged similar situations may have received lesser discipline is not grounds to substitute the Court's judgment for that of the [SPB]. . . . Padilla has not submitted any evidence or made any definite offer to show there was discrimination in the penalty." Judgment was entered on November 10, 2008.

## DISCUSSION

### I

"The [SPB] is a statewide administrative agency which is created by, and derives its adjudicatory power from, the state Constitution. [Citations.] Under that constitutional grant, the [SPB] is empowered to 'review disciplinary actions.' In undertaking that review, the [SPB] acts in an adjudicatory capacity. . . . As such, the [SPB] acts much as a trial court would in an ordinary judicial proceeding. Thus, the [SPB] makes factual findings and exercises discretion on matters within its jurisdiction. On review the decisions of the [SPB] are entitled to judicial deference. The record must be viewed in a light most favorable to the decision of the [SPB] and its factual findings must be upheld if they are supported by substantial evidence. [Citation.] In addition, the [SPB]'s exercise of discretion must be upheld unless it abuses that discretion." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 823.)

"Generally speaking, '[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.' " (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217.) "Neither an appellate court nor a trial court is free to substitute its

discretion for that of the administrative agency concerning the degree of punishment imposed." (*Fout v. State Personnel Bd.* (1982) 136 Cal.App.3d 817, 821.) " 'In reviewing the exercise of this discretion we bear in mind the principle "[c]ourts should let administrative boards and officers work out their problems with as little judicial interference as possible . . . . In determining whether an agency abused its discretion in assessing a particular penalty, a court will look to 'whether reasonable minds may differ as to the propriety of a penalty imposed.' [Citations.] Judicial interference with the agency's assessment of a penalty 'will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion by the administrative agency.' " (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 54.)

In considering whether an abuse of discretion occurred in the discipline of a public employee, "the overriding consideration . . . is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 218.)

*Ackerman v. State Personnel Board* (1983) 145 Cal.App.3d 395, which involves a CHP officer, is instructive here. " 'There are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in other callings. Public officials such as judges, policemen, and school teachers fall into such a category.' [Citations.] Given the higher standards applicable to CHP officers, the [SPB] concluded that the possibility of recurrence and circumstances

surrounding the conduct have less weight than the overriding one of harm to the public service. We cannot say that, as a matter of law, it erred." (*Id.* at pp. 400-401.)

## II

The SPB relied in part on *Mark R. Masai* (1995) SPB Precedential Dec. No. 95-01 (*Masai*), in which the SPB sustained the CHP's dismissal of Masai. While on duty, Masai visited his girlfriend at her home. She handcuffed herself with his handcuffs, and he placed her in the back of his patrol car and drove to a location two miles away. He later drove her to her place of work. Masai violated the Highway Patrol Manual's provision that "[m]embers shall advise radio whenever they transport female prisoners, and should notify radio whenever any females, other than government employees on official business, are transported." (*Id.* at p. 3.) Further, his use of a patrol car during the incident was a misuse of state resources. (*Id.* at p. 21.) Additionally, Masai lied during the investigation into his conduct. (*Ibid.*)

The SPB in *Masai* explained dismissal was appropriate because the "harm to the public service is evident. [Masai's] action of transporting Smith, handcuffed in the back of his patrol car, reflects adversely on [him] and the CHP. Whether silliness or seduction, this behavior, if known to the public, could only subject the CHP to discredit." (*Masai, supra*, SPB Precedential Dec. No. 95-01, at p. 19.)

Given that Padilla's conduct, if known to the public, would also subject the CHP to discredit, we cannot say the SPB's ruling was arbitrary or capricious. The decision explains Padilla chose "to expose his penis and allow his partner to masturbate him to the point of ejaculation while he was parked in his patrol unit at a 'Park and Ride' location

that he knew to be patrolled by other CHP officers. By risking discovery while he was engaged in such conduct in a public parking lot, he risked arrest for the crime of lewd conduct" under Penal Code section 314, and "consequential discredit" to the CHP. The decision concludes the CHP "should not be obliged to risk recurrence of [Padilla's] inappropriate behavior."

In arguing his punishment was too harsh, Padilla relies principally on *Ryan Pederson* (2007) SPB Resolution Dec. No. 06-2869 (*Pederson*). The *Pederson* decision, however, is nonprecedential. The SPB may designate certain of its decisions as precedents. (Gov. Code, § 19582.5.) The SPB's decisions are subject to the "precedent decision provision of the Administrative Procedure Act. [(Gov. Code, § 11340 et seq.)] Under the Administrative Procedure Act, [the] SPB may not expressly rely on a decision as precedent unless it has been designated as a precedent decision." (Cal. Law Revision Com. com., 33A West's Ann. Gov. Code (2009) foll. § 19582.5, p. 356.) Under the Administrative Procedure Act, an "agency may designate as a precedent decision a decision . . . that contains a significant legal or policy determination of general application that is likely to recur." (Gov. Code, § 11425.60, subd. (b).)

Courts may take judicial notice of precedential decisions, but they ordinarily decline to consider nonprecedential opinions. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 50, fn. 3; *California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1605, fn. 3.) Even considering *Pederson*, however, we find no abuse of discretion.

In *Pederson*, the CHP dismissed Pederson after he "had sex with a woman in her apartment while on duty and in uniform, visited her at her apartment while on duty, and left a CHP training [workshop] to have sex with her in a department store dressing room." (*Pederson, supra*, SPB Resolution Dec. No. 06-2869, at pp. 1, 3.) Further, Pederson did not notify dispatch he was out of service during these encounters, and he failed to properly fill out his timesheets. (*Id.* at p. 5.) Pederson admitted the behavior but argued dismissal was excessively harsh. (*Id.* at pp. 1-2.) The SPB found he was guilty of inexcusable neglect, inefficiency, and misusing state property, and his actions were incompatible with his duties as a CHP officer and harmed the public service. (*Id.* at pp. 5-7.)

The SPB also found, however, that Pederson's actions "were isolated, and served as more of an embarrassment to the CHP than a danger to the public safety. [He] responded forthrightly and honestly to all inquiries into the misconduct. He has persuasively demonstrated that he can contribute to the CHP mission, and that his conduct is not likely to recur." (*Pederson, supra*, SPB Resolution Dec. No. 06-2869, at p. 10.) The court noted Pederson voluntarily sought out counseling and entered a 12-step group recovery program, took steps to repair his relationship with his family, took full responsibility and demonstrated remorse, prior to the misconduct he was a good officer with positive performance appraisals, and after the misconduct he received glowing performance reports from his superiors. (*Id.* at pp. 7-9.) Based on mitigating circumstances, the SPB reduced his punishment from dismissal to a six-month suspension. (*Id.* at p. 10.)

Padilla asserts the wrongdoing in *Pederson* was far more egregious than the wrongdoing here, and thus his dismissal is undeserved. As the decision here discusses, however, *Pederson* is factually distinguishable. "Unlike *Pederson*, . . . [Padilla] in this appeal had only been employed for two years (rather than five years) when he engaged in the misconduct at issue. Moreover, [he] offered no evidence whether he participated in counseling, voluntary or otherwise." Further, the "circumstances surrounding [Padilla's] misconduct . . . differ from the circumstances in *Pederson* in one very important way. Here, [Padilla's] on-duty sexual escapade did not occur in the relative privacy of his partner's home or an enclosed department store dressing room." Padilla's wrongdoing occurred in a public setting frequented by CHP officers, and subjected him to risk of arrest.

In any event, similar misconduct need not necessarily result in similar penalties. Rather, the issue in each case is whether the SPB properly exercised its discretion in determining the penalty. "When it comes to a public agency's imposition of punishment, 'there is no requirement that charges similar in nature must result in identical penalties.' " (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230; *Marino v. City of Los Angeles* (1973) 34 Cal.App.3d 461, 466.) Nor is an administrative agency "bound to deal with present cases in the same manner as it has dealt with past cases that might seem comparable." (*Grannis v. Board of Medical Examiners* (1971) 19 Cal.App.3d 551, 566.) Further, "[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion." (*Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 107.)

Padilla's reliance on *Department of Parks & Recreation v. State Personnel Bd.*, *supra*, 233 Cal.App.3d 813, is also misplaced. In that case, the issue was whether "the evidence of postdismissal rehabilitation of the disciplined employee is admissible before the [SPB] and may properly be considered by it for purposes of determining whether the penalty assessed was appropriate under all of the circumstances." (*Id.* at p. 828.)

Postdismissal rehabilitation is not an issue in this case. Further, in that case the employee was a state park equipment operator, not a peace officer. (*Id.* at p. 819.)

#### DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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AARON, J.